

DOCKET NO. 2022-188-EC

Pursuant to S.C. Code Ann. Regs. §§103-825, 103-826 and other applicable Rules and Regulations of the Public Service Commission of South Carolina (the “Commission”) and S.C. Code Ann. §58-9-3030, York Electric Cooperative, Inc. (“York”) and The Electric Cooperatives of South Carolina, Inc. (“ECSC”) hereby file this petition to intervene and answer to the petition filed by Spectrum Southeast, LLC (“Charter”).

1. This proceeding is the first to come before this Commission arising under the Broadband Accessibility Act, (Act 175 of 2020) (“the Act”). In its Petition to Determine Just and Reasonable Terms and Conditions (“Petition”) Charter seeks a determination from the Commission on a specific legal issue. The ruling that Charter seeks is inconsistent with the Act and should be denied. Instead, the Commission should issue a scheduling order providing for pre-filing of testimony and an evidentiary hearing on whether York has met its obligations under the Act to offer Charter access to its poles under “...just, reasonable, and nondiscriminatory rates, fees, charges, terms and conditions...” S.C. Code Ann. §58-9-3030(A). The Act requires the

Commission to rule on the Petition within 180 days from the date it was filed. *See* S.C. Code Ann. §58-9-3030(A)(2). York and ECSC are prepared to submit testimony and participate in an evidentiary hearing on a schedule that will allow the Commission time to meet the statutory deadline.

2. One point on which York and ECSC agree with Charter is that the Act was intended by the General Assembly to promote broadband deployment in rural areas of South Carolina. The Cooperatives do not agree, however, with Charter's characterization of the means by which the General Assembly intended to promote deployment of broadband in rural areas. Charter's petition focuses entirely on provisions addressing access to the poles of electric cooperatives, as if the General Assembly intended to rely solely on incumbent broadband providers - those that for decades have failed to serve rural areas – to modify their business approaches and begin serving rural areas. An accurate description of the intent of the General Assembly is provided in the Act itself:

With this chapter, the General Assembly **intends to authorize electric cooperatives to (a) invest in or deploy broadband facilities and (b) provide broadband service in this State**, while ensuring that appropriate protections are in place to ensure that electric cooperatives do not have an unfair competitive advantage over other broadband service providers, and that the provision of broadband service by electric cooperatives does not unduly burden their electric service customers.

S.C. Code Ann. §58-9-3000(B)(3) (emphasis added).

The Act was intended to authorize and encourage South Carolina's electric cooperatives – entities created for the purpose of providing electricity to **rural** parts of South Carolina that were unserved by incumbent electricity providers – to deploy broadband facilities in rural areas. The Act also addressed the concerns of incumbent providers by adopting requirements that electric

cooperatives provide access to their poles on reasonable and non-discriminatory terms. Charter's Petition asks the Commission for a ruling on whether York has met these requirements.

3. Charter's Petition asks this Commission to rule, as a matter of law, that the Act adopted the pole attachment clearance standards of the National Electric Safety Code ("NESC") as mandatory maximum clearance standards for all electric cooperatives in South Carolina. The Act does no such thing. Although the Act does reference the NESC, it does not mandate that all cooperatives adopt the clearance standards of the code, and the Charter argument to the contrary is based on a mischaracterization of the NESC itself. The National Electric Safety Code is a set of minimum standards. The South Carolina Supreme Court has described the NESC as setting minimum safety standards in *Foreman v. Atlantic Land Corp.*, 271 S.C. 130, 132, 245 S.E.2d 609 (1978) (wire height at 29 feet was above the "minimum of 22 feet set by the National Electric Safety Code") and *Holmes v. Black River Electric Cooperative*, 274 S.C. 252, 257, 262 S.E.2d 875 (1980) (negligence shown by wires at a height well below the "minimum standards established by the National Electric Safety Code"). This Commission has adopted a regulation to the same effect.

Unless otherwise specified by the commission, after hearing if requested, the electrical utility shall use the applicable provisions of the latest edition, Part 2, of the "National Electrical Safety Code", as minimum standards of accepted good engineering practice.

See S.C. Code of Regulations, R. 103-361 (emphasis added).

There is no basis in the Act or South Carolina law for the effort by Charter to persuade this Commission to rule that the minimum standards of the NESC should be converted to a set of maximum clearance standards to be binding on all electric cooperatives. Such a ruling would prevent all of South Carolina's electric cooperatives from establishing reasonable standards to further the interests of the cooperatives in maintaining their electric distribution systems safely and

reliably. The ruling sought by Charter would also be unprecedented nationally. The Federal Communications Commission has regulated attachments to the poles of investor-owned utilities since adoption of the 1978 Pole Attachment Act, but the FCC has never enforced the NESC minimum clearances as mandatory maximum clearances.

The Commission should reject Charter's proposed reading of the Act and issue a scheduling order to provide for an evidentiary hearing on whether York has met its obligations to provide access to its poles on reasonable and nondiscriminatory terms.

II. Grounds for Intervention.

4. York is an electric cooperative formed pursuant to the provisions of Chapter 49 of Title 33 of the South Carolina Code of Laws and is governed by a board of trustees as provided in Article 7 of Chapter 49. York was incorporated in 1941 and has been distributing electricity to its members since that time. York currently serves members in York, Lancaster, Cherokee and Chester counties. York's primary responsibility is to provide reliable, low-cost electricity to its customers and to do so safely and efficiently. The Charter Petition requests relief from this Commission that would directly affect York's operations and would limit the authority of its management and board of trustees to set reasonable and non-discriminatory terms for third parties to attach facilities to York poles. York has a substantial and direct interest in this proceeding and is entitled to intervene as a matter of right pursuant to S.C. Code Ann. Regs. 103-825(A)(3).¹

5. ECSC is the state-wide service and trade association for electric cooperatives in South Carolina. Its members are eighteen of the twenty consumer-owned electric cooperatives, one wholesale power supply cooperative, one transmission service cooperative, and one materials

¹ York was named as a respondent in the Charter Petition and is or will be made a party automatically pursuant to the provisions of S.C. Code Ann. Regs. 103-804(U). York requests to intervene in an abundance of caution.

supply cooperative. ECSC serves as a legal and regulatory representative of its member electric cooperatives. Together, ECSC's members operate the largest electricity distribution system in the state. More than 1.5 million South Carolinians in all forty-six counties use electricity from electric cooperatives. ECSC's principal place of business is 808 Knox Abbot Drive, Cayce, South Carolina 29033.

The relief sought in Charter's Petition would apply to every distribution cooperative member of ECSC in the same way that it would apply to York: the ruling would affect each cooperative's operations and limit the authority of the cooperative management and boards of trustees to set reasonable and non-discriminatory terms by which third parties will be allowed to attach facilities to cooperative poles. ECSC, as the representative of its distribution cooperative members thus has a strong and direct interest in the outcome of this proceeding and should be permitted to intervene pursuant to S.C. Code Ann. Regs. 103-825(A)(3).

III. Answer to Allegations of the Petition.

6. All allegations of the Charter Petition not specifically admitted are denied.

7. York and ECSC acknowledge that: (a) York and other South Carolina electric cooperatives are required by the Act to provide access to cooperative utility poles to communication service providers like Charter on reasonable and non-discriminatory terms and conditions (*see* §58-9-3030(A)); (b) when requested by a communications service provider like Charter, York and other South Carolina electric cooperatives are required to negotiate on a new contract to apply to new attachments by the communications service provider to the cooperative poles (*see* §58-9-3030(A)(2)); and (c) that if negotiations on a new pole attachment agreement fail to produce an agreement, either party may apply to this Commission for a determination of reasonable and non-discriminatory terms and conditions (*see* §58-9-3030(A)(2)).

8. York and ECSC acknowledge that Charter requested that York negotiate a new pole attachment agreement establishing reasonable terms and conditions, that the negotiations failed to result in an agreement, and that this Commission now has jurisdiction to conduct a proceeding to determine reasonable and non-discriminatory terms and conditions.

9. York and ECSC will show that York negotiated in good faith and repeatedly offered Charter reasonable and non-discriminatory terms and conditions as required by the Act.

10. York and ECSC deny the allegations in paragraphs 18 and 19 of the Charter Petition that agreement was reached on all terms but clearances as those allegations mischaracterize a proposal made by York in an attempt to reach a good faith compromise on reasonable terms and conditions.

11. York and ECSC will show that York's clearance requirements are reasonable and non-discriminatory and have been included in all York pole attachment agreements since 2008; that all seven of York's current pole attachment agreements with communications service providers require the same clearances that Charter finds objectionable.

12. York and ECSC will show that York's decision to require clearances different from the minimum clearances found in the NESC was based on years of experience with attachments to its poles not being properly maintained by communications service providers and those communications service providers being unresponsive to York efforts to require proper maintenance. York and ECSC will further show that the York clearance requirements were intended by York to protect the integrity and reliability of its electricity distribution system and the clearance requirements have been successful in achieving that result.

13. As discussed previously in this pleading, York and ECSC deny the allegation by Charter that the Act requires York or any South Carolina electric cooperative to adopt the

minimum clearances of the NESC as maximum clearances for attachments to their poles. The clearance requirements of the NESC are minimum safety requirements and clearance requirements that require additional space do not conflict with the NESC. The Act requires electric cooperatives to offer attachments to poles on reasonable and non-discriminatory terms; it does not require electric cooperatives to adopt the NESC minimum requirements as maximum clearances.

WHEREFORE, York and ECSC request the following:

- (1) permit York and ECSC to intervene as parties in this proceeding;
- (2) issue a scheduling order providing for an evidentiary hearing to determine whether York met its obligation under the Act to offer access to its poles on reasonable and non-discriminatory terms and conditions.

Respectfully submitted this 2nd day of June 2022.

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